

96-012

OPINIONS CITED

75-008

81-058

81-060

81-090

83-006



STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

1275 WEST WASHINGTON, PHOENIX 85007-2926

GRANT WOODS
ATTORNEY GENERAL

MAIN PHONE : 542-5025
TELECOPIER : 542-4085

October 3, 1996

Susan Plimpton Segal
Gust Rosenfeld
201 N. Central, Suite 3300
Phoenix, AZ 85073

Re: I96-012 (R96-035)

Dear Ms. Segal:

Pursuant to A.R.S. § 15-253(B), we have reviewed your August 2, 1996 opinion to the Superintendent of the Creighton Elementary School District, No.14 regarding the application of Arizona's Open Meeting Law (A.R.S. §§ 38-431 through 431.09) to a school district's evaluation of its Superintendent's performance. We concur with the conclusion in your opinion that under the Open Meeting Law ("OML"), when a public body meets in an executive session to evaluate the performance of a public officer, appointee, or employee of the public body ("employee"), only the actual evaluation¹ may take place in executive session. Furthermore, the OML prohibits public bodies from conducting lengthy meetings in executive sessions under the guise of holding personnel evaluations in order to gather information about the operations of its public programs. We have decided to issue this formal opinion because a public body's procedures for conducting personnel evaluations in compliance with the OML is of statewide interest, the issue of personnel evaluations in executive sessions applies to all public bodies and not just school districts, and public bodies that have questions in this area may not have ready access to your well-reasoned opinion.

¹ Evaluation encompasses "discussion or consideration of employment, assignment, appointment, promotion, demotion, dismissal, salaries, disciplining or resignation of a public officer, appointee or employee of any public body." A.R.S. § 38-431.03(A)(1).

Background

Although your opinion relates to a school district's evaluation of its superintendent, other public bodies² also regularly evaluate the performance of their key employees. These evaluations are used to determine the employee's continued employment, promotion, demotion, or compensation. To make these personnel decisions, members of the public body must be aware of the employee's performance on each topic covered by the evaluation. Historically, most public bodies have gathered the specific information necessary for the employee's evaluation and completed the evaluation at one meeting, while other public bodies reportedly have fallen into the trap of holding lengthy (e.g., all day) meetings in executive sessions to gather information about global matters related to the operation of the public body, only to complete the employee's evaluation paperwork later and then conduct the formal evaluation at a subsequent meeting.

Analysis

Arizona's OML was designed to ensure that the public has access to information regarding the manner in which government conducts the public's business. Ariz. Att'y Gen. Op. I83-006. The Legislature mandated that "[a]ll meetings of any public body shall be public meetings and all persons so desiring shall be permitted to attend and listen to the deliberations and proceedings." A.R.S. § 38-431.01(A). However, certain exceptions to this openness exist. The OML allows public bodies to meet for seven narrowly defined purposes in "executive sessions" that exclude the public. See A.R.S. § 38-431.03(A)(1)-(7). One authorized executive session purpose referred to in your opinion, commonly known as the "personnel exception," is for "discussion or consideration of employment, assignment, appointment, promotion, demotion, dismissal, salaries, disciplining or resignation of a public officer, appointee or employee of any public body." A.R.S. § 38-431.03(A)(1).

Courts have construed exceptions to the OML very narrowly because of the official state policies that favor open and public meetings. See, e.g., *Fisher v. Maricopa County Stadium District*, 185 Ariz.116, 912 P.2d 1345 (App. 1995) (the Arizona Court of Appeals

² The OML defines "public body" as the "legislature, all boards and commissions of the state or political subdivisions, all multi-member governing bodies of departments, agencies, institutions and instrumentalities of the state or political subdivisions, including without limitation all corporations and other instrumentalities whose boards of directors are appointed or elected by the state or political subdivision. Public body includes all quasi-judicial bodies and all standing, special or advisory committees or subcommittees of, or appointed by, such public body." A.R.S. § 38-431(5).

narrowly interpreted the "legal advice" executive session exception to the OML to "promote openness in government, not to expand exceptions which could be used to obviate the rule," and relied on cases from other states that narrowly construed exceptions to the OML and favored requiring public meetings). Therefore, public bodies must be cautious. If the issue proposed to be discussed is not specifically listed as one of the seven enumerated OML exceptions, an executive session may not be held.

For purposes of the personnel exception in A.R.S. § 38-431.03(A)(1), a public body's *actual evaluation* of a specific employee's job performance is a "personnel matter, which the Board may elect to discuss in an executive session unless the [employee] requires that the discussion take place in an open meeting." Ariz. Att'y Gen. Op. I81-090. The personnel exception in the OML depicts the tension between the public's right to information regarding the manner in which government conducts the public's business and the need for confidentiality in certain areas. In adopting the personnel exception to the OML, the Legislature recognized that personnel matters require confidential discussions. *See Hokanson v. High School Dist. Number Eight of Pima County*, 121 Ariz. 264, 267, 589 P.2d 907, 910 (App. 1979). In interpreting a previous, but nearly identical, version of the personnel exception to the OML the Arizona Court of Appeals acknowledged:

A.R.S. § 38-431.03 is clearly intended to establish an equilibrium between the public's desire for access and the governmental agency's need to act in private, short of reaching 'a collective decision, commitment or promise.' We do not believe the legislature intended on the one hand to authorize a private discussion of personnel matters, and on the other to require a recital of the discussion in public.

Id. at 267-68, 589 P.2d at 910-11.

Because of the balancing required between the openness demanded by the OML and the legitimate necessity for privacy in exploring sensitive personnel issues, we cannot provide school districts and other public bodies with a bright-line rule that ensures compliance with the OML while respecting legitimate needs for confidential consideration of personnel issues that may not be appropriate for public disclosure. Each case must be decided on its own facts.

Nonetheless, public bodies must be mindful that tactics that undermine the openness policy of the OML will quickly run afoul of the narrow exceptions to the OML. *See, e.g.*, Ariz. Att'y Gen. Op. I75-08 (any scheme or device "used to circumvent the purposes of the [OML], would constitute a violation which would subject the governing body and the

participating members to the several sanctions provided for in the [OML]"). For example, it is not appropriate under the OML to gather public information concerning tax rates, student achievement scores, the cost of school lunches, strategic plans for the district, and other such matters in an executive session under the guise of a personnel evaluation. This information reflects the state of the school district and is public information. *See* Ariz. Att'y Gen. Op. I81-058 (opining that all budget matters must be discussed in open meetings, except for limited budget matters absolutely necessary for the board to give instructions to its negotiators respecting salaries and fringe benefits); Ariz. Att'y Gen. Op. I81-060 (curriculum discussion must take place at a public meeting); *see also Arizona Agency Handbook* § 7.4.1.

We do not believe, however, that the authorization in A.R.S. § 38-431.03(A)(1) for "discussion or consideration" should be so narrowly construed as to eliminate the public body's ability to discuss with supervisors and others familiar with the employee's performance specifics of the individual's performance and obtain facts that are necessary for the evaluation. Such a narrow interpretation would undermine the exception and make it purposeless. *See Walls v. Arizona Dep't of Pub. Safety*, 170 Ariz. 591, 594, 826 P.2d 1217, 1220 (App. 1991) (in interpreting a statute, legislative intent controls and a pragmatic construction is required if a technical construction would lead to an absurdity). Thus, we advise public bodies to favor openness unless public disclosure of confidential or sensitive personnel information would undermine the purpose of the executive session.

As you suggested in your opinion, a public body that wishes to discuss or consider the employee's evaluation in executive session, pursuant to A.R.S. § 38-431.03(A)(1), should adopt a bifurcated process that would permit the public body to gather information about public programs at a public meeting, while allowing the public body to enter executive session to discuss or consider the actual evaluation. Support for a bifurcated personnel evaluation process is found in the policy directive of the OML favoring open and public meetings. *See* A.R.S. § 38-431.09 ("any person or entity charged with the interpretation of [the OML] shall . . . construe any provision . . . in favor of open and public meetings").

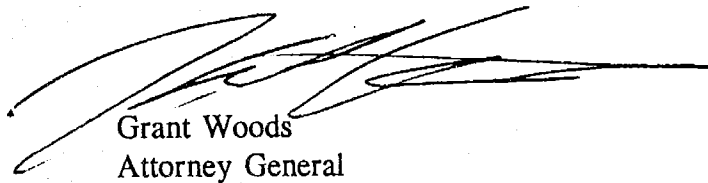
Additionally, our conclusion does not prohibit a public body from discussing related budgetary matters, program issues, or other items in executive session that are *necessary* to its evaluation of an employee. Public bodies, however, should be alert to the substance of their discussions and the purpose for which the executive session is authorized and must not allow a narrow OML exception to frustrate the Legislature's objective of promoting openness in government.

Susan Plimpton Segal
October 3, 1996
Page 5

Conclusion

The OML prohibits public bodies from conducting lengthy information gathering meetings in executive sessions that explore the operation of public programs under the guise of conducting a personnel evaluation. Only the actual evaluation -- discussion or consideration of the performance of the employee -- may take place in an executive session.

Sincerely,



Grant Woods
Attorney General